



# *CASE CLIPS*

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## **CRIMINAL LAW ISSUES**

**GRIFFIN v. STATE, No. 49S02-0101-CR-43, \_\_\_ N.E.2d \_\_\_ (Ind. Feb. 22, 2002).**  
SHEPARD, C. J.

Griffin challenges our conclusion that the trial court properly excluded testimony by his former attorney that one William Dulin confessed to the crime. [Citation omitted.] The defense put Dulin on the stand, knowing he would deny having confessed, in order to get the attorney's hearsay testimony admitted under the guise of impeachment. [Citation omitted.] Griffin says we failed to consider Chambers v. Mississippi, 410 U.S. 284 (1973). In Chambers, a murder occurred during a barroom brawl. [Citation omitted.] Four months afterward, Gable McDonald swore in writing that he was the shooter, but he later repudiated his confession. [Citation omitted.] Three of McDonald's acquaintances were prepared to testify that he orally confessed to them on separate occasions. [Citation omitted.]

At trial, Chambers' lawyer called McDonald and introduced the written confession into evidence. [Citation omitted.] The State then elicited testimony about the repudiation, plus a fresh denial by McDonald. [Citation omitted.] Chambers was denied permission to cross-examine McDonald as an adverse witness based on Mississippi's "voucher" rule. [Citation omitted.] He was also denied the opportunity to introduce testimony by the three other witnesses to whom McDonald confessed. [Citation omitted.]

The U.S. Supreme Court held, "[U]nder the facts and circumstances of this case" the "exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him . . . due process." [Citation omitted.] It emphasized "persuasive assurances of trustworthiness" of the hearsay statements: (1) three confessions made spontaneously to close acquaintances shortly after the murder; (2) other corroborating evidence; [footnote omitted] (3) the fact that the statements were against interest; and (4) the fact that McDonald was available at trial. [Citation omitted.]

Chambers does not, as Griffin claims, stand for the proposition that the exclusion of hearsay evidence about a single confession, standing alone, violates federal due process. [Footnote omitted.]

Griffin's case is distinguishable from Chambers for several reasons. Most importantly, unlike in Chambers, Griffin claims only one evidentiary error, because he was permitted to attack Dulin's credibility and motivation.<sup>4</sup> Moreover, the trial court allowed certain testimony alluding to Dulin's alleged confession. The former attorney was not allowed to answer the question "Did [Griffin] make a confession?", [citation to Record omitted], but she testified that when she was still on the case she listed Dulin as a defense witness because he made "statements that would strengthen [Griffin's] case," [citation to Record omitted.]

<sup>4</sup> Griffin's lawyer introduced a booking sheet giving Dulin's first name as James, the name the carjacker used, which Dulin denied ever having used. [Citation to Record omitted.] Dulin then admitted he was residing in jail, facing charges for another crime. [Citation to Record omitted.]

The confessions at issue in the two cases are also very different in terms of reliability. Griffin points to one oral confession made to a person who, although bound by professional ethics, was serving as his legal advocate, compared to Chambers' three confessions to disinterested acquaintances. [Footnote omitted.] Furthermore, the corroborating evidence against Dulin is meager [footnote omitted] compared to the eyewitness testimony against McDonald in Chambers.

The dissent's more generous application of Chambers would create serious potential for abuse. Any friend of a defendant with access to the crime scene, later knowledge of the whereabouts of contraband, or similar circumstantial connections could confess to a reliable witness that he actually committed the crime. The friend could then promptly repudiate that confession, leaving the defendant with a credible witness to finger someone else but running little or no risk of prosecution and conviction.

In summary, Chambers does not establish that Griffin was denied federal due process.

....

DICKSON, RUCKER, SULLIVAN, JJ., concurred.

BOEHM, J, filed a separate written opinion in which he dissented, in part, as follows:

Griffin offered the testimony of Lorinda Youngcourt, his former attorney. Youngcourt, in an offer to prove in question and answer form, testified that she met with William Dulin in the course of preparing to defend Griffin in this case, and in that meeting Dulin confessed that he had committed the carjacking. I think Youngcourt should be viewed as a disinterested party. I also believe her testimony is corroborated by enough other evidence that its exclusion deprived Griffin of his Sixth Amendment right to present witnesses in his defense. Accordingly, I respectfully dissent from the Court's conclusion that this testimony is not sufficiently reliable to be admissible under the basic fairness doctrine enunciated in Chambers v. Mississippi, 410 U.S. 284 (1973).

Griffin was denied an opportunity to present Youngcourt's testimony because Dulin's confession was deemed hearsay if offered to prove the truth of Dulin's statement that he was the perpetrator. The same evidence was excluded as impeachment of Dulin under the doctrine that impeachment is improper if the sole basis for calling the witness to be impeached (Dulin) was to lay the groundwork for otherwise inadmissible impeaching evidence (Youngcourt's testimony). [Citation omitted.]

I agree that Youngcourt's testimony does not fall within any exception to the hearsay rule. Her account of Dulin's confession is not permitted as a statement against interest under Indiana Evidence Rule 804(b)(3) [footnote omitted] because Dulin was not "unavailable" as that term appears in Indiana Evidence Rule 804(a). [Footnote omitted.] Indeed, Dulin was present and testified at Griffin's trial. Nor was Youngcourt's testimony admissible as a prior inconsistent statement by a witness under Indiana Evidence Rule 801(d)(1) [footnote omitted] because Dulin's confession to Youngcourt was not given under oath. For the reasons given in the Court's initial opinion, I also agree that this court correctly applied Indiana precedent which does not permit Youngcourt's testimony as impeachment of Dulin if Dulin was called as a witness solely to obtain his denial of a confession, thereby laying the groundwork for Youngcourt's impeaching testimony. Accordingly, I agreed with the majority and concurred in the original opinion affirming Griffin's conviction under Indiana Evidence Rules. I now believe I was incorrect in that view.

....

Finally, in coming to its conclusion that Dulin's confession was not reliable enough to be admitted over hearsay rules, the majority relies heavily on the fact that, at the

time she met with Dulin, Youngcourt was Griffin's counsel. I disagree with the majority's characterization of Youngcourt as an interested witness. At the time Youngcourt testified, she was no longer Griffin's attorney. Additionally, Youngcourt, as an officer of the court, would face serious disciplinary consequences in addition to the sanctions for perjury applicable to other witnesses. Moreover, I see no reason to suppose that Youngcourt, a public defender, had anything to gain by giving false evidence. [Citation omitted.]

In sum, Chambers teaches that hearsay rules may not shield trustworthy evidence from being admitted at trial. Youngcourt's testimony seems to me to be sufficiently reliable and corroborated by other evidence. Its conflict with other accounts is for the jury to sort out, not for the trial court or this Court to resolve as a matter of evidentiary ruling. . . .

**HUDDLESTON v. STATE, No. 02A03-0106-CR-176, \_\_\_ N.E.2d \_\_\_ (Ind. Feb. 25, 2002).**  
RILEY, J.

This case is before us on a petition for rehearing filed by the State of Indiana, requesting that we reconsider our holding in *Huddleston v. State*, 756 N.E.2d 1054 (Ind. Ct. App. 2001). . . . [H]uddleston entered a plea of guilty to a single count of child molesting.

. . .

. . . [T]he trial court ordered restitution of \$1,380.00. That amount included the wages lost by the mother of the victim due to her attendance at the court proceedings.

. . . .

. . . In our original opinion, we concluded that the trial court abused its discretion in ordering restitution for the lost wages of Cheryl Nagy (Nagy), the mother of the victim, based on the finding that the evidence did not sufficiently demonstrate that Nagy suffered injury, harm, or loss as a direct and immediate result of Huddleston's acts. [Citation omitted.]

. . . We now grant the State's petition for the purpose of vacating our original opinion due to the fact that Appellee's Appendix was filed but apparently misplaced in the Clerk's office and not entered on the docket.

Due to this oversight, we did not have access to the pre-sentence investigation report, which included the victim impact statement requesting restitution and a letter from Francisco Ortiz, an investigator/victim impact specialist for the Allen County Probation Department. This letter advised Nagy of her right to seek restitution; a notation on the letter indicates that Nagy requested reimbursement of lost wages in the amount of \$1,380.00. The reimbursement request was also entered on the pre-sentence investigation report as the victim's impact statement. This evidence, combined with the letter from Nagy's employer indicating the days she missed work without pay due to various pre-trial dates, trial dates, counseling appointments, and other related proceedings in relation to this case, the computation of Nagy's wages, and Nagy's testimony, necessitates the vacating of our original opinion.

. . . .

[T]he State correctly asserts that the trial court had sufficient evidence to order restitution. . . .

[T]he victim impact statement included in Huddleston's pre-sentence investigation report noted that Nagy was requesting "\$1,380.00 in restitution for loss of wages due to pre-trial conferences, court dates, doctor/counseling appointments, and other appointments related to the present case." [Citation to Brief omitted.] Therefore, we find that Nagy suffered injury, harm, or loss as a direct and immediate result of the criminal acts of a defendant. [Citation omitted.] Thus, the trial court did not abuse its discretion in ordering restitution.

. . . .

SHARPNACK, C. J. and NAJAM, J., concurred.

## CIVIL LAW ISSUES

**STATE FARM FIRE & CAS. CO. v. T. B., No. 53S01-0102-CV-99, \_\_\_ N.E.2d \_\_\_ (Ind. Feb. 21, 2002).**

SHEPARD, C. J.

State Farm Fire and Casualty Company declined to represent an insured homeowner in a suit brought by a child whom the insured's husband molested during daycare in the insured's home. The insured agreed to a consent judgment of \$375,000, with the stipulation that none of it would be collected from the homeowner, and assigned all policy rights to the child. The trial court entered the judgment. It later granted summary judgment in favor of the child in proceedings supplemental against State Farm.

State Farm appeals, claiming that the trial court erred when it (1) estopped State Farm from raising the childcare exclusion in the homeowner's policy as a defense, and (2) awarded contractual damages in an amount exceeding the limits of the homeowner's policy. We agree.

. . . Vicki Dobson operated a daycare center in her home in Bloomington, Indiana, for about twenty-five years. T.B was one of her charges. On April 4, 1996, Dobson left T.B. and three other children with her husband Murl, while Dobson went across the street to care for her mother-in-law. Murl molested T.B. and was later convicted of child molesting.

. . . At the time of the molestation, the Dobsons owned a homeowner's insurance policy issued by State Farm. . . . The policy also included the following relevant exclusions:

### SECTION II - EXCLUSIONS

1. Coverage L and Coverage M do not apply to:

. . .

(i) any claim made or suit brought against any insured by:

(1) any person who is in the care of any insured because of child care services provided by or at the direction of:

(a) any insured;

(b) any employee of any insured; or

(c) any other person actually or apparently acting on behalf of any insured; or

(2) any person who makes a claim because of bodily injury to any person who is in the care of any insured because of child care services provided by or at the direction of:

(a) any insured; . . .

. . .

State Farm received notice of the lawsuit on May 8, 1997, . . . . State Farm responded six days later with two letters, one acknowledging receipt of T.B.'s letter and explaining that an investigation was underway, and another addressed to the Dobsons. In the Dobson letter, State Farm questioned its obligation to defend or indemnify the Dobsons and reserved the right to deny coverage if a claim arose out of childcare services provided by

the insured.

After receiving a copy of T.B.'s complaint, State Farm took statements from the Dobsons. It later advised them to procure legal representation at their own expense, explaining that previous cases similar to the Dobsons' were found not to be covered by the policy. State Farm subsequently denied coverage to the Dobsons, saying: "After a thorough investigation of the Complaint against [the Dobsons] we have concluded that the allegations against Murl Dobson do not involve an occurrence as defined by the policy." [Citation to Record omitted.] State Farm's letter also observed that "Murl and Vicki Dobson were providing full-time childcare services for many children and have done so for many years." [Citation to Record omitted.]

On November 5, 1997, T.B. and the Dobsons tendered an offer of judgment and covenant agreement which the trial court accepted. The Dobsons agreed to assign to T.B. all rights, interests and remedies against State Farm arising from their homeowner's policy. The agreement also provided for a money judgment of \$375,000, conditioned upon T.B.'s promise not to execute on the Dobson's personal assets.

About a month after entry of judgment, T.B. filed a verified motion for proceedings supplemental and garnishment against State Farm. State Farm and T.B. filed cross motions for summary judgment. The trial court granted summary judgment to T.B., and State Farm appealed. The Court of Appeals affirmed the summary judgment, though it reduced the award amount to the policy limit, which was \$300,000. State Farm Fire & Cas. Co. v. T.B. ex rel. Bruce, 728 N.E.2d 919 (Ind. Ct. App. 2000). We grant transfer.

... State Farm first asserts that summary judgment in T.B.'s favor was inappropriate because the trial court improperly estopped State Farm from raising the childcare exclusion as a defense in the garnishment proceeding. State Farm specifically argues that it should not be bound by factual statements contained in T.B.'s consent judgment that were not necessary to the resolution of the underlying action.

... An insurer may avoid the effects of collateral estoppel by: (1) defending the insured under a reservation of rights in the underlying tort action, or (2) filing a declaratory judgment action for a judicial determination of its obligations under the policy. [Citation omitted.] ...

An insurer may also elect not to defend an insured party in a lawsuit if, after investigation of the complaint, the insurer concludes that the claim is "patently outside the risks covered by the policy." [Citation omitted.] Such a course is taken at the insurer's peril because the insurer will be "bound at least to the matters necessarily determined in the lawsuit." Frankenmuth Mut. Ins. Co. v. Williams, 645 N.E.2d 605, 608 (Ind. 1995) (citation omitted) (emphasis added).

State Farm received notice of T.B.'s complaint against the Dobsons and promptly investigated. State Farm subsequently decided not to defend the Dobsons and "concluded the allegations against Murl Dobson do not involve an occurrence as defined by the policy." [Citation to Record omitted.] Neither did State Farm file for declaratory judgment. Consequently, State Farm is bound to the matters necessarily determined in the lawsuit.

B. Matters Necessarily Determined. State Farm concedes that collateral estoppel prevents it from disputing certain findings necessary to establish the Dobsons' liability, such as the finding that the molestation was negligent. State Farm challenges, however, factual statements included in the consent judgment establishing that the child's injury was unrelated to daycare activities. It says this finding was "not a necessary element of the consent judgment." [Citation to Brief omitted.] State Farm observes that T.B. and the Dobsons "characterize[d] the events in a very specific manner, with the obvious intent of seeking to bring the judgment within the coverage of the policy." [Citation to Brief omitted.]

The offered judgment, tendered by T.B. and the Dobsons and entered by the trial

court, indicated:

The [Dobsons] represent that the occurrence of misfeasance . . . proximately resulting in serious bodily injury and harm to [T.B.] was separate from, independent of, and had no direct or indirect factual or legal connection or relationship to Vicki L. Dobson's separate and sole ownership and operation of her limited, part-time child care activities and services. The existence of said day care activities and services is only an independent and coincidental circumstance which does not give rise to any breach of duty or legal responsibility as relevant to the occurrence and injuries described herein.

[Citation to Record omitted.] We agree with State Farm that these characterizations were unnecessary to sustain T.B.'s complaint for damages regarding negligence and premises liability. [Citation to Record omitted.] The statement's apparent sole purpose was to isolate the molestation from the childcare activities.

In Frankenmuth, 645 N.E.2d at 608, we explained that an insurer having sufficient notice of the lawsuit is "bound at least to matters necessarily determined in the lawsuit" when the insurer declines to defend or seek declaratory judgment. The term "at least" in the holding signifies only a minimum requirement. Frankenmuth, therefore, left some question of whether an insurer is bound as to matters not "necessarily determined." Consideration of the requirement that adequate notice precede application of collateral estoppel persuades us not to broaden the portions of a consent agreement to which an insurer is bound.

The notice requirement provides the insurer with a base of information from which to determine whether to participate in a lawsuit. Specifically, prior notice alerts an insurer of the factual determinations that will be made in order to resolve the litigation. Thus, an insurer's failure to participate in the action will bind it to those determinations. Unnecessary determinations are less predictable. Estopping an absent party from contesting unnecessary matters settled upon by the consenting parties invites collusive or fraudulent determinations.

T.B.'s lawsuit against the Dobsons claimed personal and premises liability. The portions of the consent agreement that resolved these issues are binding on State Farm.

T.B.'s claim did not specifically address State Farm's contractual obligations under the Dobsons' homeowner's policy. The consent agreement, nevertheless, did. The statement that T.B.'s molestation was separate from Vicki Dobson's daycare services was unnecessary to resolve T.B.'s complaint. It was thus tantamount to dictum, and State Farm should not have been estopped from challenging it during proceedings supplemental.

Vicki Dobson operated a daycare in her home for several years, and T.B.'s mother paid Vicki Dobson to care for her daughter over a period of years. Drawing all facts and reasonable inferences in favor of State Farm, it appears as though T.B. was in the Dobsons' home for the sole purpose of benefiting from childcare services. Accordingly, we reverse the trial court's grant of summary judgment for T.B. as to the childcare exclusion. The trial court should take evidence on this question and rule on the merits.

BOEHM, DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

**VADAS v. VADAS, No. 45S04-0103-CV-145, \_\_\_ N.E.2d \_\_\_ (Ind. Feb. 22, 2002).**  
SHEPARD, C. J.

In October 1993, James Vadas needed cash to pay his financial obligation to an earlier wife. His father John Vadas agreed to buy James' house on Cline Avenue in Crown Point for \$128,000, part of which he financed with an \$89,600 mortgage.

James and Rita married in April 1995. Within a few months, Rita sold a house she

received from a previous divorce settlement and the couple moved into the Cline Avenue home. About \$20,000 of proceeds from the sale went into remodeling the Cline Avenue property. James took a four-month leave of absence from his job to work on the remodeling, and throughout their marriage, James and Rita paid the mortgage on the property.

John, James and Rita all expected that James and Rita would buy the house back from John when they were financially able, but this never came to pass. In May 1997, Rita filed for dissolution of the marriage and claimed an equitable interest in the house. The trial court treated the entire net equity of \$78,000 [footnote omitted] as a marital asset. It awarded the real estate interest to John and ordered him to pay half the amount to Rita.

On review, the Court of Appeals agreed that “Rita and James held a vested, present interest in said property through their joint efforts and monetary contributions” and affirmed. Vadas v. Vadas, 728 N.E.2d 250, 259 (Ind. Ct. App. 2000). We granted transfer.

. . . A baseline principle of Indiana family law is that “[o]nly property with a vested interest at the time of dissolution may be divided as a marital asset.” Mullins v. Matlock, 638 N.E.2d 854, 856 (Ind. Ct. App. 1994). Black’s Law Dictionary 1557 (7<sup>th</sup> ed. 1999) defines a vested interest as one “[t]hat has become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute.” [Citation omitted.]

....

The facts presented here find a close analogy to those of In re Dall, 681 N.E.2d 718 (Ind. Ct. App. 1997). There, the wife’s parents provided \$93,000 to build a home that was to be conveyed to the husband and wife at some indefinite future date. [Citation omitted.] The husband labored 2,400 hours helping to construct the home and, when the couple divorced, the trial court included the home in the marital estate at a value of \$150,000. [Citation omitted.]

The Court of Appeals reversed, holding that “an equitable interest in real property titled in a third-party, although claimed by one or both of the divorcing parties, should not be included in the marital estate.” [Citation omitted.] Although the couple “may have hoped eventually to acquire legal title to the property . . . they did not have a definite agreement that title would be transferred to them.” Id. at 721 (distinguishing Sovern v. Sovorn, 535 N.E.2d 563 (Ind. Ct. App. 1989), where “the owners of record title disclaimed any interest in the real estate.”). Therefore, in Dall, “neither Husband nor Wife possessed the definite interest necessary for the home to be included in the marital estate.” 681 N.E.2d at 721.

The holding of Dall promotes predictability, consistency and efficiency by excluding “remote and speculative” interests from the marital estate. [Citation omitted.] The property at issue here is just such a speculative interest. Rita’s investment and James’ labor increased the home’s value during the marriage, but general market conditions before and after the marriage would also account for some part of the appreciation. [Citation to Record omitted.] The sale to James and Rita was to occur at some unspecified future date, contingent upon James’ getting back “on his feet” financially. [Citation to Record omitted.] Neither price nor terms had been discussed, although John wanted to recover what he put into the property (unlike the record owner in Sovern, who did not claim any interest in the property in question). [Citation to Record omitted.]

Because James and Rita did not have a vested interest in the Cline Avenue home, the trial court erred in including \$78,000 equity as marital property. Of course, the relationship between James and John Vadas and James’ occupation of the remodeled residence reflects on the relative housing needs of James and Rita and is a relevant consideration in dividing the property that is a part of the marital pot.

....

On appeal, James and John argue that the trial court lacked personal jurisdiction over John due to improper service. [Citation omitted.] Because we have concluded that the

residence was not marital property, we reverse both the judgment against John Vadas and the attachment of the judgment to the Cline Avenue real estate, and need not address the question about personal jurisdiction.

....  
DICKSON and RUCKER, JJ., concurred.

BOEHM, J., filed a separate written opinion in which he dissented, and in which SULLIVAN, J., concurred, in part as follows:

Although I agree with the majority that John has title to the house as against the rest of the world, I believe James is estopped from denying that the couple's interest in the property had vested. . . .

. . . After dissolution of the first marriage, James "sold" the house to John to permit James to satisfy his financial obligations from the first marriage. In substance, John purchased the property from James at one third of its market value because the mortgage in the amount of \$89,000 on a \$128,000 sale was, in practical terms, retained as an obligation of James. Both John and James agreed that the house would be transferred back to James when James was "ready." After the sale, James continued living in the house for over a year and a half. When James married Rita, the couple lived in the house except for a few months when they resided at Rita's house to prepare it for sale. The couple paid all expenses of the house, including the mortgage, taxes, and insurance. They, not John, claimed the mortgage interest as a deduction on their joint tax return, which is permissible only if it was their debt and not John's.

. . . Relying on James' statements that the house would be deeded back to James and Rita, Rita, who knew the house was titled in John's name, used all of the net proceeds from the sale of her home to remodel the house. [Footnote omitted.] This contributed to an increase in the value of the house of almost \$40,000. The majority notes that "Rita's investment and James' labor increased the home's value during the marriage, but general market conditions before and after the marriage would also account for some part of the appreciation." The record seems to me to establish that most, if not all, of the increase was attributed to Rita's investment in the home. [Footnote omitted.] . . .

....  
[E]stoppel is appropriate here. James and John induced Rita to go forward with remodeling the property, and Rita relied upon James and John's actions, believing in good faith the house would belong to her and James. All parties involved agreed that the house would be transferred back to James and Rita, and, as a result, everyone treated the property at issue as if Rita and James owned the property.

. . . One way to view this arrangement is a sale subject to a repurchase agreement for \$37,000. If so, the value of the equity in the home above the sum of the repurchase price of \$37,000 plus the mortgage of \$87,000 is a marital asset, just as any option to buy at below market price has value. I think this arrangement may also be properly viewed as, in effect, a loan secured by an equitable mortgage from John. As such, the debt to John of \$37,000 is a marital liability, and the couple's interest in the house is a marital asset. "[A] court may find an equitable mortgage where a deed, absolute on its face, is executed simultaneously with an agreement under which the grantor is entitled to a reconveyance upon performance of conditions." [Citation omitted.] [Footnote omitted.] . . . When asked what he expected when he consummated the expected re-transfer to James, John replied that he wanted only to "get my money out of it." [Footnote omitted.] It seems clear to me that this reflected his understanding that the transaction was, in substance if not in form, a loan of \$37,000 to James. As a result, I would include the \$37,000 debt to John as a liability of the marital estate.

....  
. . . I believe the trial court and Court of Appeals were incorrect in holding that John

was properly served and made a party to the dissolution proceedings. However, I believe that issue is irrelevant to this case. Although the dissolution court could not determine John's rights in the house without joining John, it could determine, as between James and Rita, what assets are in the marital pot.

In July 1997, Rita filed a "Motion to Join" John as a party pursuant to Trial Rule 20(A)(2). [Footnote omitted.] She mailed a copy of this motion to James' counsel by first class mail, but she did not serve John with a copy of the motion and issued no summons. The final hearing on the parties' dissolution took place in January 1998. During the first day of a two-day hearing, John was called as a witness by Rita. John made no objection to being called as a witness, and voluntarily testified.

The trial court found that John was a necessary party to the litigation pursuant to Trial Rule 20(A)(2) and, when it filed the dissolution decree in August of 1998, ruled for the first time that he was joined as a party. . . . The Court of Appeals concluded that John voluntarily waived any objection to personal jurisdiction because he voluntarily appeared in court and participated in the proceedings by testifying as a witness without objection. [Citation omitted.] As a result, the Court of Appeals held that John was precluded from challenging the trial court's personal jurisdiction over him. [Citation omitted.]

In my view, John was never added as a party by the trial court. Indiana Trial Rule 4 provides that "[t]he court acquires jurisdiction over a party or person who under these rules commences or joins in the action, is served with summons or enters an appearance, or who is subjected to the power of the court under any other law." Ind. Trial Rule 4. John meets none of these tests. . . .

The parties cite no Indiana precedent for the proposition that testifying as a witness without objection at a trial subjects a witness or his property to the jurisdiction of the trial court, and I know of none. Indeed, in my view, this procedure violated John's due process and due course of law rights guaranteed by the federal and state constitutions. . . .

....

In my view, Rita unnecessarily sought to add John under Indiana Trial Rule 20(A)(2). Had Rita sought title to the house, Trial Rule 20(A)(2) would have been necessary because an order terminating John's interest would be required. However, Rita asked only for a dollar amount reflecting her interest in the marital assets. That can be awarded without affecting John's title to the house. Because John was not made a party, John is still free to dispute the extent of his interest in the house. If John chooses to do that, James will be exposed to the risk of inconsistent adjudications. To avoid this risk, however, James could, if he wished, have invoked Indiana Trial Rule 19(A)(2)(b). . . .

....

**GKC INDIANA THEATRES, INC. v. ELK RETAIL INVESTORS, LLC., No. 20A03-0108-CV-281, \_\_\_ N.E.2d \_\_\_ (Feb. 21, 2002).**  
SHARPNACK, C. J.

Somewhat surprisingly, the specific question of whether an appellant may challenge the sufficiency of the evidence supporting the trial court's decision to grant a preliminary injunction after not questioning the sufficiency of the evidence supporting the preliminary injunction in the trial court is one of first impression in our state. Nevertheless, we were able to locate an informative case on this issue from another jurisdiction and an informative case on a similar issue in this jurisdiction.

....

Reviewing these cases has led us to the conclusion that GKC waived for appeal any argument regarding the sufficiency of the evidence to support Elk Retail's motion for preliminary injunction. At the trial court, GKC argued an affirmative defense, which in essence "admit[ted] the essential allegations of the complaint, but assert[ed an] additional

matter barring relief.” Molargik [v. West Enterprises, Inc.], 605 N.E.2d [1197 (Ind. Ct. App. 1993)] at 1199. GKC did not argue in the trial court that Elk Retail had failed to meet its burden of proof on the essential elements required for a preliminary injunction. Therefore, once the trial court had determined that GKC’s affirmative defense was invalid, the trial court had no reason to believe that GKC thought that the preliminary injunction was otherwise inappropriate. . . . GKC may not now allege on appeal that Elk Retail had an adequate remedy at law. [Footnote omitted.] [Citations omitted.] Consequently, we need not address the merits of GKC’s allegation that the trial court abused its discretion by granting the preliminary injunction because Elk Retail did not meet its burden of proof on the four required elements. [Footnote omitted.]

. . . .  
BAILEY and DARDEN, JJ., concurred.

**WARD v. WARD, No. 49A02-0107-CV-464, \_\_\_ N.E.2d \_\_\_ (Ind. Ct. App. Feb. 21, 2002).**  
NAJAM, J.

Here, Mother presents an issue of first impression to this court, namely, whether a non-custodial parent is entitled to a credit against a custodial parent’s child support arrearage where that custodial parent is dependent on SSI.

It is well settled that SSI, food stamps, and other means-tested public assistance programs are excluded from a parent’s income for the purpose of computing child support under Indiana Child Support Guideline 3A. [Citation omitted.] And this court has consistently held that SSI recipients, as a matter of law, cannot be held in contempt for failure to comply with child support orders. [Citations omitted.] Here, the dissolution court acknowledged that it could not order Mother to pay her arrearage given her dependence on SSI, but the court nonetheless gave a credit to Father in the amount of Mother’s arrearage.

. . . Where, as here, the custodial parent’s sole means of support is SSI, AFDC, and food stamps, a court order suspending the non-custodial parent’s child support obligation is not in the best interests of the child. The order essentially punishes the children for Mother’s failure to satisfy her prior support obligation.

Common sense dictates that the parent who is entitled to receive child support payments must expend her own funds to support the children when the parent obligated to pay support fails to do so. [Citation omitted.] According to the Child Support Guidelines, Mother has no income. But the effect of Father’s credit against Mother’s arrearage is that Mother must support her children entirely with her SSI and other assistance. We hold that the credit is an indirect means of forcing Mother to pay her arrearage and is, therefore, contrary to law.

. . . .  
BAKER and MATTINGLY-MAY, JJ., concurred.

**ELKINS v. ELKINS, No. 09A05-0103-CV-126, \_\_\_ N.E.2d \_\_\_ (Ind. Ct. App. Feb. 25, 2002).**  
FRIEDLANDER, J.

Diana contends that the trial court abused its discretion by including as a divisible marital asset support arrearage owed to her by the father of her children. Neither party directs our attention to an Indiana case holding one way or the other on the question of whether child support arrearage is includable as a divisible marital asset. A recent decision by the Indiana Supreme Court on a different but related issue leads us to conclude that it is not.

In *In re Hambright*, No. 02S04-0104-CV-212, 2002 WL 126944 (Ind. Jan. 31, 2002) our supreme court confronted the question of whether child support arrearages owed to a custodial parent are assets of that parent’s bankruptcy estate. . . . The central principle upon which the holding was based was that, “[a]s a matter of law, arrearages, like current

and future support, are held for the children, and the custodial parent has no individual property interest in them.” *In re Hambright*, 2002 WL 126944, at \*4.

IC § 31-15-7-4 (West 1998) provides that in a dissolution action, the court shall divide the property of the parties that was owned by either spouse individually before the marriage, acquired by the parties’ joint efforts, or acquired by either spouse after the marriage and before the parties’ final separation. The kinds of property subject to division, as set out in the statute, all share a common characteristic: they are owned by the parties, either jointly or separately. *In re Hambright* clarifies a principle previously established in a different context under Indiana law, i.e., that support arrearages are not owned by the parent, but instead are held by the parent in trust for the child. Consistent with this reasoning, we conclude that support arrearages are not includable as marital property subject to division in a dissolution proceeding. [Footnote omitted.] . . .

. . . .  
BARNES and VAIDIK, JJ. concurred.

**GIBSON v. HERNANDEZ, No. 71A03-0109-CV-301, \_\_\_ N.E.2d \_\_\_ (Ind. Ct. App. Feb. 26, 2002).**

SHARPNACK, C. J.

The sole issue raised by the BMV is whether the trial court erred when it granted a restricted driving permit to Hernandez that allowed Hernandez to drive to, from, and during the course of her employment and to transport her children to and from both school and doctor’s appointments in emergencies. Specifically, the BMV alleges that the trial court exceeded its authority under Ind. Code § 9-24-15-2. . . .

Ind. Code § 9-24-15-2 provides that if:

- (1) an individual’s driving license has been suspended under Indiana motor vehicle law; and,
- (2) because of the nature of the individual’s employment the suspension would work an undue hardship and burden upon the individual’s family or dependents;

the individual may file a verified petition for a restricted driving permit for the sole purpose of driving to and from work and in the course of employment during the period of the driving license suspension.

I.C. § 9-24-15-2 (emphasis added). . . .

The BMV contends that the trial court exceeded its authority by granting Hernandez a restricted driving permit that allowed her to drive her children to school and doctor’s appointments in cases of emergency. Hernandez argues that the trial court has discretion to evaluate each individual’s circumstances in issuing the restricted driving permit.

The statute states that the restricted driving permit may be granted “for the sole purpose of driving to and from work and in the course of employment during the period of the driving license suspension.” I.C. § 9-24-15-2 (emphasis added). This language is clear and unambiguous and does not support competing interpretations. . . .

Thus, the trial court did not err in granting a restricted driving permit to Hernandez for the purpose of driving to and from work and in the course of her employment. *Id.* However, the statute does not permit a trial court to grant a restricted driving permit for the transportation of children to and from school and doctor’s appointments even in emergencies. *Id.* The trial court erred when it granted a restricted driving permit to Hernandez allowing her to transport her children to and from school and doctor’s appointments in emergencies. [Footnote omitted.] [Citation omitted.]

. . . .

DARDEN, J., concurred.

BAILEY, J., filed a separate written opinion in which he concurred in part and in which he dissented in part, as follows:

While I concur with the majority's affirmation of the trial court's grant of a restricted driving permit to Hernandez, I respectfully dissent from the majority's reversal of the order providing that Hernandez may drive her children to and from school and doctor's appointments in emergencies. In my opinion, the majority too narrowly construes the term "employment" as used in Indiana Code section 9-24-15-2(2).

. . . .

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